



## ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim as his request was untimely filed and failed to demonstrate clear evidence of error.

## FACTUAL HISTORY

This case has previously been before the Board. OWCP accepted that on June 1, 2006 appellant, then a 63-year-old logistical support worker, sustained a tear of the horn of his right knee posterior meniscus and a sprain/strain of his right knee. The accepted conditions were later expanded to include cervical radiculopathy. Appellant stopped work on June 5, 2006 and did not return.

In February 2010, appellant was referred to an OWCP-sponsored vocational rehabilitation program. In a March 6, 2011 report, his vocational rehabilitation counselor found him vocationally and physically capable of earning wages in the constructed position of operations manager. In a March 11, 2011 form report, Dr. Robert Wood, an attending Board-certified orthopedic surgeon, indicated that appellant could work eight hours per day in "sedentary duty only."

In a June 15, 2011 decision, OWCP reduced appellant's compensation to zero effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager. It noted that the physical duties of the position were sedentary in nature and that they were in accordance with the restrictions provided by his attending physician, and that his rehabilitation counselor had determined that he was vocationally capable of performing the position given his business degree and 27 years of experience in transportation operations.

Appellant disagreed with this decision and, through counsel, requested a hearing before an OWCP hearing representative. In a March 1, 2012 decision, an OWCP hearing representative affirmed OWCP's June 15, 2011 decision, finding that appellant was physically and vocationally capable of performing the selected position of operations manager.

In a February 15, 2013 decision,<sup>3</sup> the Board affirmed OWCP's March 1, 2012 decision, finding that OWCP properly adjusted appellant's compensation effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager. The Board found that OWCP properly relied on the professional assessment of appellant's vocational rehabilitation counselor when it determined that appellant could earn wages in the position. The medical and vocational suitability of the position and the reasonable availability of the position within appellant's commuting area were determined to be sufficiently documented in the record.<sup>4</sup>

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<sup>3</sup> Docket No. 12-1218 (issued February 15, 2013).

<sup>4</sup> In a June 14, 2013 order, the Board denied appellant's petition for reconsideration of its February 15, 2013 decision.

In a letter dated July 11, 2013 and received by OWCP on July 15, 2013, appellant, through counsel, requested reconsideration of his claim. In an August 29, 2013 decision, OWCP again found that it had properly adjusted appellant's compensation effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager.

In a letter dated October 11, 2013 and received by OWCP on October 15, 2013, appellant, through counsel, requested reconsideration of OWCP's August 29, 2013 decision. OWCP conducted a merit review of appellant's claim and issued a March 12, 2014 decision affirming its August 29, 2013 decision. It determined that it had properly adjusted appellant's compensation effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager.

On March 9, 2015 OWCP received counsel's request for reconsideration of his claim. The letter contained argument from counsel in support of appellant's claim that OWCP improperly adjusted his compensation effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager. A second copy of the request for reconsideration was received by OWCP on March 19, 2015

In a decision dated April 17, 2015, OWCP refused to reopen appellant's case for further review of the merits of his claim because his request was untimely filed and failed to demonstrate clear evidence of error. It found that appellant's reconsideration request was untimely, indicating that it was received on March 19, 2015, *i.e.*, a period more than one year after OWCP's last merit decision dated March 12, 2014. OWCP then found that the evidence and argument submitted by appellant in support of his reconsideration request did not establish clear evidence of error in its March 12, 2014 decision.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>5</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>6</sup>

OWCP, however, may not deny an application for review solely because the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."<sup>7</sup> OWCP regulations and procedure provide that it will reopen a claimant's case for merit

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>7</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if appellant's application for review shows "clear evidence of error" on the part of OWCP.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>11</sup>

### ANALYSIS

OWCP accepted that on June 1, 2006 appellant sustained a tear of the horn of his right knee posterior meniscus and a sprain/strain of his right knee. The accepted conditions were later expanded to include cervical radiculopathy. Appellant stopped work on June 5, 2006 and did not return. In February 2010, he was referred to an OWCP-sponsored vocational rehabilitation program. OWCP reduced appellant's compensation to zero effective June 5, 2011 based on his ability to earn wages in the constructed position of operations manager. In a February 15, 2013 decision, the Board affirmed OWCP's reduction of appellant's compensation effective June 5, 2011. In decisions dated August 29, 2013 and March 12, 2014, OWCP affirmed its reduction of appellant's compensation effective June 5, 2011.

In a decision dated April 17, 2015, OWCP refused to reopen appellant's case for further review of the merits of his claim because his request was untimely filed and failed to demonstrate clear evidence of error. It found that appellant's reconsideration request was untimely<sup>12</sup> and then found that the evidence and argument submitted by appellant in support of his reconsideration request did not show clear evidence of error in its March 12, 2014 decision.

The Board finds that, in its April 17, 2015 decision, OWCP improperly determined that appellant filed an untimely request for reconsideration of its March 12, 2014 decision. Appellant's reconsideration request was timely because it was received on March 9, 2015, less than one year after OWCP's March 12, 2014 decision.

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<sup>8</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedures further provide, "The term 'clear evidence of error' is intended to represent a difficult standard. [Appellant] must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that [appellant] had a dependent but the award was not paid at the augmented rate. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error."

<sup>9</sup> *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

<sup>10</sup> 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>11</sup> *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

<sup>12</sup> OWCP indicated that appellant's reconsideration request was received on March 19, 2015, *i.e.*, a period more than one year after OWCP's last merit decision dated March 12, 2014.

Because appellant filed a timely reconsideration request, OWCP improperly considered his reconsideration under the clear evidence of error standard used for untimely reconsideration requests.<sup>13</sup> Therefore, the case shall be remanded to OWCP for consideration of appellant's timely reconsideration request under the standards for timely reconsideration requests.<sup>14</sup>

**CONCLUSION**

The Board finds that OWCP improperly refused to reopen appellant's case for further review of the merits of his claim. The case is remanded to OWCP for further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 17, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 8, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> See *supra* notes 7 and 8.

<sup>14</sup> *Supra* note 1 at § 8128(a); 20 C.F.R. §§ 10.606(b)(3), 10.607(a).